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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/824,121

04/14/2004

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27752 7590 08/03/2009  
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EXAMINER

HAND, MELANIE JO

ART UNIT

PAPER NUMBER

3761

MAIL DATE

DELIVERY MODE

08/03/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* GREGORY ASHTON, EIRO FUKUDA, and  
MASAHARU NISHIKAWA

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Appeal 2009-001532  
Application 10/824,121  
Technology Center 3700

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Decided:<sup>1</sup> August 3, 2009

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Before TONI R. SCHEINER, DONALD E. ADAMS, and ERIC GRIMES,  
*Administrative Patent Judges.*

GRIMES, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to an  
absorbent article having a dual cuff. The Examiner has rejected the claims

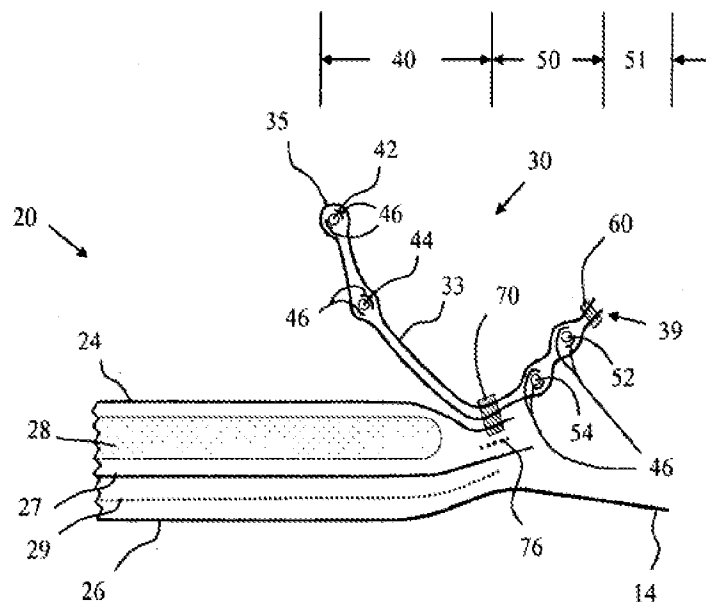
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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil  
action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date  
shown on this page of the decision. The time period does not run from the  
Mail Date (paper delivery) or Notification Date (electronic delivery).

as anticipated by the prior art. We have jurisdiction under 35 U.S.C. § 6(b).  
We reverse.

### STATEMENT OF THE CASE

The Specification discloses an absorbent article having a “dual cuff . . . constructed of a continuous cuff material and enclosed by a cuff end bond” (Spec. 2: 5-6). The Specification’s Figure 2 is shown below:



The Figure shows a fragmentary sectional view of an absorbent article, including a cross-section of the dual cuff (*id.* at 2: 25). The Specification describes the cuff as follows:

Dual cuff 30 has a proximate end 35, distal end 39, and regions therebetween identified as first cuff 40 and second cuff 50. Dual cuff 30 may be constructed from a continuous cuff material 33 that substantially envelopes the elastics [42, 44] of first cuff 40 and [52, 54] second cuff 50. . . . Moreover, cuff material 33 need only be enclosed/bonded at a single location, as exemplified by cuff end bond 60, in order to substantially envelope elastics 42, 44, 52, 54, thus providing improved

barrier properties by minimizing the number of potential leakable locations (e.g., bonding locations).

(*Id.* at 9: 11-21.)

Claims 1-17 are on appeal. Claims 1 and 14 are the only independent claims and read as follows:

1. A unitary disposable absorbent article comprising:
  - an absorbent core having a garment surface and a body surface;
  - a liquid permeable topsheet positioned adjacent said body surface of said absorbent core;
  - a liquid impermeable backsheet positioned adjacent said garment surface of said absorbent core; and
  - an elastically contractible dual cuff having a proximate end and a distal end, said dual cuff being joined to said article by an intermediate bond, said dual cuff having a first cuff and a second cuff, said first cuff being disposed between said proximate end and said intermediate bond, said second cuff being disposed between said intermediate bond and said distal end, said dual cuff being constructed of a continuous cuff material and enclosed by a cuff end bond, said cuff end bond being disposed at said distal end and connecting a first edge of the continuous cuff material to a second edge of the continuous cuff material;wherein said second cuff is spaced away from said backsheet.
14. A unitary disposable absorbent article comprising:
  - an absorbent core having a garment surface and a body surface;
  - a liquid permeable topsheet positioned adjacent said body surface of said absorbent core;
  - a liquid impermeable backsheet positioned adjacent said garment surface of said absorbent core; and
  - an elastically contractible dual cuff having a proximate end and a distal end, said dual cuff being joined to said article by an intermediate bond, said dual cuff having a first cuff and a second cuff, said first cuff being disposed between said proximate end and said intermediate bond, said second cuff being disposed between said intermediate bond and said distal

end, said dual cuff being constructed of a continuous cuff material and enclosed by a cuff end bond connecting a first edge of the continuous cuff material to a second edge of the continuous cuff material, wherein at least one of said first and second cuffs includes a pair of operatively associated elastic members extending substantially along the length thereof;

wherein said second cuff is spaced away from said backsheet, wherein said dual cuff is bonded to said article by a single bond.

## ANTICIPATION

### *Issue*

The Examiner has rejected claims 1-17 under 35 U.S.C. § 102(b) as anticipated by Kielpikowski.<sup>2</sup> The Examiner finds that Kielpikowski discloses a diaper meeting all of the limitations of the claims on appeal (Ans. 3-4).

Appellants contend that Kielpikowski's diaper does not include a cuff end bond connecting first and second edges of a continuous cuff material, as required by the claims (Appeal Br. 9-10).

The issue presented is: Did the Examiner err in finding that Kielpikowski discloses an absorbent article that includes a dual cuff made of a continuous cuff material and enclosed by a cuff end bond that connects first and second edges of the continuous cuff material?

### *Findings of Fact*

1. Kielpikowski discloses an absorbent article comprising a containment flap assembly that includes inner and outer containment flaps (Kielpikowski, col. 1, ll. 38-50)

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<sup>2</sup> Kielpikowski, U.S. Patent 5,669,896, issued Sept. 23, 1997.

2. Kielpikowski discloses that the “outer containment flaps 26 and inner containment flaps 34 are formed from a first integral sheet of containment flap material 42” (*id.* at col. 3, ll. 4-6).

3. Kielpikowski discloses that the “containment flap assembly 24 further comprises a second sheet of containment flap material 44 . . . attached to said first sheet of containment flap material. The second sheet of containment flap material 44 is superposed on, and generally coincides with, the first sheet of containment flap material 42” (*id.* at col. 3, ll. 16-21).

4. Kielpikowski discloses that the containment flaps comprise elastic members between the sheets of containment flap material (*id.* at col. 5, ll. 16-18).

5. Kielpikowski teaches that:

[i]n one embodiment, the first and second elastic members are adhesively attached to the first sheet of containment flap material in a pretensioned condition. Those skilled in the art will recognize that a wide variety of adhesive materials are suitable for use in the present invention. Specifically, the adhesive may comprise a hot melt adhesive, a pressure-sensitive adhesive, latex adhesive, and the like. . . . Other suitable methods include thermal bonding, ultrasonic bonding, infrared bonding, radio frequency bonding, and the like.

(*Id.* at col. 5, ll. 30-48.)

6. Kielpikowski discloses that the “same methods and materials may be employed to join the second sheet of containment flap material to the first sheet of containment flap material” (*id.* at col. 5, ll. 48-51).

7. Kielpikowski discloses a method of making the disclosed absorbent article in which a first sheet of containment flap material is provided from a supply roll and elastic members are attached to it by

adhesive, and then a “second sheet of containment flap material 44 is supplied from fourth supply roll 68 and is attached to the first sheet of containment flap material so as to locate the elastic members between the first and second sheets of containment flap material” (*id.* at col. 8, ll. 33-46).

8. Kielpikowski discloses that the “combination of first and second sheets of containment flap material and first and second elastic members passes through a pair of nip rollers” (*id.* at col. 8, ll. 46-48).

9. The Examiner finds that “[n]ip rolls bond substrates together via embossing” (Ans. 5).

10. Kielpikowski discloses that a “cutter 72 removes a portion of the first and second sheet of containment flap material . . . to define an opening 46 and to form a containment flap assembly. . . . The cross-hatched areas illustrated in FIG. 10 will be removed by cutter 72 to produce the containment flap assembly.” (*Id.* at col. 8, ll. 49-64.)

11. Kielpikowski discloses that “[i]n another embodiment of the present invention, the first and second sheets of containment flap material are integrally formed. That is, the first and second sheets of containment flap material are formed from a single, integral piece of material through a folding process in which the single piece of material is folded upon itself to form two layers” (*id.* at col. 4, ll. 49-55).

12. Kielpikowski does not disclose any more details of the folded-upon-itself embodiment of its containment flap assembly.

### *Principles of Law*

“[I]n an *ex parte* proceeding to obtain a patent, . . . the Patent Office has the initial burden of coming forward with some sort of evidence tending to disprove novelty.” *In re Wilder*, 429 F.2d 447, 450 (CCPA 1970).

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

However, the “very essence of inherency is that one of ordinary skill in the art would recognize that a reference unavoidably teaches the property in question.” *Agilent Technologies, Inc. v. Affymetrix, Inc.*, 567 F.3d 1366, 1383 (Fed. Cir. 2009).

For a rejection under 35 U.S.C. § 102 to be proper, the “reference must clearly and unequivocally disclose the claimed [product] or direct those skilled in the art to the [product] without *any* need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of the cited reference.” *In re Arkley*, 455 F.2d 586, 587 (CCPA 1972) (emphasis in original).

### *Analysis*

All of the claims on appeal require the presence of a dual cuff “constructed of a continuous cuff material and enclosed by a cuff end bond” that “connect[s] a first edge of the continuous cuff material to a second edge of the continuous cuff material” (claims 1 and 14). Kielpikowski does not expressly describe the recited cuff end bond.



The Examiner finds, however, that a cuff end bond is described by the folded-upon-itself embodiment and the method of making the containment flap assembly that are described by Kielpikowski, because

[n]ip rolls bond substrates together via embossing. Thus, in the folded single material embodiment, the first and second edges of the folded layer of containment flap material are necessarily bonded together around the elastic 32 at the distal end because the material is folded in half. Thus, passing the folded material through a nip roll with the elastic 32 forms a cuff end bond as claimed.

(Ans. 5-6.)

In effect, the Examiner's reasoning is that *if* the manufacturing method described by Kielpikowski was applied to the folded-upon-itself embodiment, and *if* the folded-upon-itself embodiment was folded longitudinally rather than transversely, the required cuff end bond would result from passing the containment flap assembly through a nip roller.

We do not agree that this reasoning supports a finding of anticipation. First, Kielpikowski does not disclose that the folded-upon-itself embodiment is folded longitudinally rather than transversely. In the illustrated embodiments, the containment flap assembly is shown as having nonparallel, outwardly rounded distal edges that could not be made by folding a single, continuous sheet of material longitudinally. Although Kielpikowski states that "the distal edges 30 may . . . be parallel" (Kielpikowski, col. 3, ll. 54-55), it does not relate that alternative embodiment to the folded-upon-itself alternative embodiment.

Second, Kielpikowski does not disclose making the folded-upon-itself embodiment via the process described in column 8 of the reference. That process starts with two separate sheets of containment flap material, which

are attached together with elastic members between them. Kielpikowski does not teach that the folded-upon-itself embodiment can be made by the same process. In addition, Kielpikowski's Figure 10 shows that both edges of the containment flap sheets are cut away in making the final containment flap assembly, so that even if the disclosed process was carried out with the folded-upon-itself embodiment, the two sheets in the final product would not be attached at a fold line, and therefore the final containment flap assembly would not be "constructed of a continuous cuff material" as required by the claims.

The Examiner's rejection relies on combining properties of different embodiments disclosed by Kielpikowski, and inferring that a cuff end bond would result if a certain product was made in a certain way. The Examiner's reasoning is not adequate to support a finding that Kielpikowski inherently discloses a product meeting all the limitations of the claims on appeal.

### *Conclusion of Law*

The Examiner erred in finding that Kielpikowski discloses an absorbent article that includes a dual cuff made of a continuous cuff material and enclosed by a cuff end bond that connects first and second edges of the continuous cuff material.

### SUMMARY

We reverse the rejection of claims 1-17 as anticipated by Kielpikowski.

### REVERSED

Appeal 10/824,121  
Application 2009-001532

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